No. 16-1519

In the Supreme Court of the United States

SERGIO FERNANDO LAGOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

RANDOLPH L. SCHAFFER, JR.
1021 Main, Suite 1440
Houston, TX 77002

DANIEL L. GEYSER
Counsel of Record
STRIS & MAHER LLP
Three Energy Square
6688 N. Central Expy., Ste. 1650
Dallas, TX 75206
(214) 396-6634
daniel.geyser@strismaher.com

PETER K. STRIS
DOUGLAS D. GEYSER
JOHN STOKES
STRIS & MAHER LLP
725 S. Figueroa St., Ste. 1830
Los Angeles, CA 90017

QUESTION PRESENTED

Under the Mandatory Victims Restitution Act (MVRA), courts must order the defendant to "reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." 18 U.S.C. 3663A(b)(4).

In the decision below, the Fifth Circuit held that this provision covers the costs of internal investigations and private expenses in a related bankruptcy case. It so held even though these expenses were "neither required nor requested" by the government, were incurred *outside* the government's official investigation, were incurred *before* the government's investigation began, and failed to resemble "child care" or "transportation" expenses in any conceivable way.

The question presented is:

Whether Section 3663A(b)(4) covers professional costs that were "neither required nor requested" by the government, including costs incurred for the victim's own purposes and unprompted by any official government action.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions involved 2
Statement 2
A. Background 2
B. Facts and procedural history 10
Summary of argument 13
Argument 16
I. The MVRA does not authorize restitution for internal investigations and professional fees that were independent of the criminal investigation and unprompted by the government 16
A. Section 3663A(b)(4) does not cover private costs that were unprompted by the government, preceded the criminal investigation, and were incurred for the victim's own purposes 17
1. Section 3663A(b)(4)'s plain text unambiguously excludes independent internal investigations and separate civil litigation from the MVRA 17
2. Section 3663A(b)(4)'s statutory context and history confirm that restitution is unauthorized for these expenses 26
B. The contrary interpretation—embraced by the government and multiple courts of appeals—is unsupportable 29
C. Under the rule of lenity, any statutory ambiguity should be construed against sweeping and unconventional restitution orders 31

Page

Table of contents—continued:

II. The court of appeals erred in applying the MVRA to the undisputed facts of this case 32
Conclusion 34
Appendix — Statutory provisions 1a

TABLE OF AUTHORITIES

Cases:

Baker Botts L.L.P. v. *ASARCO LLC*, 135 S. Ct. 2158 (2015) 19
Bearden v. *Georgia*, 461 U.S. 660 (1983) 9
Circuit City Stores, Inc. v. *Adams*, 532 U.S. 105 (2001) 25
CSX Trans., Inc. v. *Ala. Dep't of Revenue*, 562 U.S. 277 (2011) 25
Dolan v. *United States*, 560 U.S. 605 (2010) 29
Fogerty v. *Fantasy, Inc.*, 510 U.S. 517 (1994) 19
Hall Street Assocs., L.L.C. v. *Mattel, Inc.*, 552 U.S. 576 (2008) 25
Henson v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718 (2017) 17
Hughes Aircraft Co. v. *Jacobson*, 525 U.S. 432 (1999) 17
Hughey v. *United States*, 495 U.S. 411 (1990) 31
Johnson v. *Bredesen*, 624 F.3d 742 (6th Cir. 2010) 9
Jones v. *United States*, 529 U.S. 848 (2000) 31
Kucana v. *Holder*, 558 U.S. 233 (2010) 27
Loughrin v. *United States*, 134 S. Ct. 2384 (2014) 22
Pa. Dep't of Corrections v. *Yeskey*, 524 U.S. 206 (1998) 20
Rodriguez v. *United States*, 480 U.S. 522 (1987) 29

Page

Cases—continued:

United States v. *Amato*, 540 F.3d 153 (2d Cir. 2008) 30
United States v. *Bahel*, 662 F.3d 610 (2d Cir. 2011) 26
United States v. *Cuti*, 778 F.3d 83 (2d Cir. 2014) 22
United States v. *Dwyer*, 275 F. App'x 269 (5th Cir. 2008) 11
United States v. *Herrera*, 606 F. App'x 748 (5th Cir. 2015) 11
United States v. *Hosking*, 567 F.3d 329 (7th Cir. 2009) 26
United States v. *Juvenile Female*, 296 F. App'x 547 (9th Cir. 2008) 17
United States v. *Mitchell*, 429 F.3d 952 (10th Cir. 2005) 2
United States v. *Nucci*, 364 F.3d 419 (2d Cir. 2004) 29
United States v. *Phillips*, 477 F.3d 215 (5th Cir. 2007) 11, 12
United States v. *Santos*, 553 U.S. 507 (2008) 31
United States v. *Skowron*, 529 F. App'x 71 (2d Cir. 2013) 26
United States v. *Stennis-Williams*, 557 F.3d 927 (8th Cir. 2009) 31
United States v. *Texas*, 507 U.S. 529 (1993) 28, 29
United States v. *Tilleras*, 709 F.2d 1088 (6th Cir. 1983) 29
Yates v. *United States*, 135 S. Ct. 1074 (2015) 18

Statutes:

Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, Tit. II, Subtit. A, § 204(a), 110 Stat. 1227 ..... *passim*
18 U.S.C. 3663A ..... *passim*

Page

Statutes—continued:

18 U.S.C. 3663A(a)(1) 2, 3
18 U.S.C. 3663A(a)(2) 2, 12
18 U.S.C. 3663A(b)(1) 3
18 U.S.C. 3663A(b)(2) 3
18 U.S.C. 3663A(b)(3) 3
18 U.S.C. 3663A(b)(4) ..... *passim*
18 U.S.C. 3663A(c) 2, 3
18 U.S.C. 3663A(c)(1) 2
18 U.S.C. 3663A(c)(1)(A)(ii) 5
18 U.S.C. 3663A(c)(3)(B) 24
Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 5, 96 Stat. 1248 ..... *passim*
18 U.S.C. 3663(a)(1)(A) 3
18 U.S.C. 3663(b)(4) 3, 22, 27
18 U.S.C. 3663(b)(6) 5, 27
1 U.S.C. 1 30
18 U.S.C. 1593(b)(3) 5
18 U.S.C. 2248(a) 4
18 U.S.C. 2248(b)(1) 4
18 U.S.C. 2248(b)(3)(E) 4, 27
18 U.S.C. 2248(b)(3)(F) 4, 27
18 U.S.C. 2259(a) 27
18 U.S.C. 2259(b)(1) 4
18 U.S.C. 2259(b)(3)(E) 4, 29
18 U.S.C. 2259(b)(3)(F) 4, 29
18 U.S.C. 2327(a) 4
18 U.S.C. 2327(b)(1) 4
18 U.S.C. 2327(b)(3) 4
18 U.S.C. 3613A(a) 9
18 U.S.C. 3664 6
18 U.S.C. 3664(d)(1) 6
18 U.S.C. 3664(d)(2)(A)(iii) 6
18 U.S.C. 3664(d)(2)(A)(vi) 6
18 U.S.C. 3664(d)(3) 6
21 U.S.C 853 4

Page

Statutes—continued:

21 U.S.C. 853(q) 4
28 U.S.C. 1254(1) 1
Pub. L. No. 110-326, § 202, 122 Stat. 3560, 3561 (2008) 5
Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40504, 108 Stat. 1796, 1947 3
Ala. Code 1975 § 15-22-36.1 9
Missouri Stat. § 155.133.2 9
Tex. Elec. Code § 11.002(a)(4) 9

Other Authorities:

Hon. William M. Acker, Jr., *The Mandatory Victims Restitution Act Is Unconstitutional. Will the Courts Say So After* Southern Union *v.* United States*?*, 64 Ala. L. Rev. 803 (2013) 6, 7, 8, 9
4 W. Blackstone, *Commentaries on the Laws of England* (1769) 28
Matthew Dickman, *Should Crime Pay?: A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 Cal. L. Rev. 1687 (2009) 8
Allyson Fredericksen & Linnea Lassiter, *Disenfranchised by Debt* (Alliance for a Just Society, March 2016) 9
Richard E. Laster, *Criminal Restitution: A Survey of Its Past History and An Analysis of Its Present Usefulness*, 5 U. Rich. L. Rev. 71 (1970) 28
Cortney E. Lollar, *What is Criminal Restitution?*, 94 Iowa L. Rev. 93 (2014) 9
Bradford Mank, *The Scope of Criminal Restitution: Awarding Unliquidated Damages in Sentencing Hearings*, 17 Capital Univ. L. Rev. 55 (1987) 28
S. Rep. 104-179, 104th Cong., 1st Sess. (1995) 24
U.S. Gen. Accounting Office, GAO-18-203, *Federal Criminal Restitution: Most Debt Is Outstanding and Oversight of Collections Could Be Improved* (Feb. 2018) 7

In the Supreme Court of the United States

No. 16-1519

SERGIO FERNANDO LAGOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 864 F.3d 320. The judgment of the district court (Pet. App. 12a-27a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 2017. The petition for a writ of certiorari was filed on June 15, 2017, and granted on January 12, 2018. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of the Mandatory Victims Restitution Act of 1996 (MVRA), Pub. L. No. 104-132, Tit. II, Subtit. A, § 204(a), 110 Stat. 1227, codified at 18 U.S.C. 3663A; the Victim and Witness Protection Act of 1982 (VWPA), Pub. L. No. 97-291, § 5(a), 96 Stat. 1248, 1253, codified at 18 U.S.C. 3663; and the Violence Against Women Act of 1994, Pub. L. No. 103-322, Tit. IV, Subtit. A, § 40113(b), 108 Stat. 1902, 1907, codified at 18 U.S.C. 2259, are reproduced in the appendix to this petition (App., *infra*, 1a-12a).

STATEMENT

A. Background

1. "'Federal courts possess no inherent authority to order restitution, and may only do so as explicitly empowered by statute.'" *United States* v. *Mitchell*, 429 F.3d 952, 961 (10th Cir. 2005) (McConnell, J.) (citation omitted); see, *e.g.*, *United States* v. *Papagno*, 639 F.3d 1093, 1096 (D.C. Cir. 2011). Over the past few decades, Congress has enacted numerous laws providing for restitution in specific circumstances, and each time it has tailored the type of restitution to the offense covered. Here the district court used the MVRA, 18 U.S.C. 3663A, the only statute that authorized restitution for petitioner's crime.

The MVRA was enacted in 1996 to require restitution for "victim[s]" of a wide subset of federal crimes, including certain violent crimes, property offenses, and fraud. See 18 U.S.C. 3663A(a)(1), (c). The Act defines "victim" as "a person directly and proximately harmed as a result of the commission" of any specified offense. 18 U.S.C. 3663A(a)(2). It "appl[ies] in all sentencing proceedings" for "any" covered crime. 18 U.S.C. 3663A(c)(1).

The MVRA makes restitution mandatory where it applies: "the court *shall* order * * * that the defendant make

restitution to the victim of the offense." 18 U.S.C. 3663A(a)(1) (emphasis added). While the order is mandatory, restitution is limited to four categories of eligible expenses: (1) the value of lost property (or the return of that property, if possible); (2) medical and related expenses in cases of bodily injury; (3) "the cost of necessary funeral and related services" in cases of death; and (4) the category at issue here—"lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." 18 U.S.C. 3663A(b)(1)-(4).

2. As noted, the MVRA is only part of the statutory landscape governing restitution. Congress enacted the MVRA against the backdrop of other laws, which also provide restitution in defined circumstances, and Congress has repeatedly tweaked these restitution statutes to match the expenses with the offense.

The first major development in this area was the Victim and Witness Protection Act of 1982 (VWPA), Pub. L. No. 97-291, § 5, 96 Stat. 1248, which authorizes *discretionary* restitution for a large set of crimes not covered by the MVRA. See 18 U.S.C. 3663(a)(1)(A) (listing offenses "other than an offense described in section 3663A(c)"). As enacted, the VWPA enumerated only three categories of eligible expenses, which correspond to the first three categories of relief as the MVRA (18 U.S.C. 3663(b)(1)-(3)). In 1994, Congress added a fourth category to the VWPA: "lost income and necessary child care, transportation, and other expenses *related to* participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." 18 U.S.C. 3663(b)(4) (emphasis added); see Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40504, 108 Stat. 1796, 1947.

The same 1994 act that added this fourth category also authorized even broader restitution for narrower sets of crimes involving sexual abuse, sexual exploitation of children, domestic violence, and email and telemarketing fraud. See Pub. L. No. 103-322, § 40113(a)(1), 108 Stat. 1904; *id.* § 40113(b)(1), 108 Stat. 1907; *id.* § 40221(a), 108 Stat. 1928; *id.* § 250002(a)(2), 108 Stat. 2082. Those statutes provide that, "[n]otwithstanding section 3663 or 3663A," the court "shall" order restitution for "the full amount of the victim's losses," which expressly includes all "losses suffered by the victim as a proximate result of the offense." 18 U.S.C. 2248(a), (b)(1), (b)(3)(F); accord 18 U.S.C. 2259(a), (b)(1), (b)(3)(F); 18 U.S.C. 2264(a), (b)(1), (b)(3)(F); 18 U.S.C. 2327(a), (b)(1), (b)(3).

When Congress passed the MVRA two years later, it duplicated the first three categories from the VWPA (Section 3663), but limited the fourth category of expenses to those incurred "during" participation in the investigation or prosecution or attendance at related proceedings. 18 U.S.C. 3663A(b)(4). It did not include all "proximate" losses as in the new 1994 statutes.

When Congress has added restitution authority after the MVRA, it has taken various tacks, incorporating the MVRA's or VWPA's provisions or the broad language of the new 1994 provisions, or articulating entirely different expenses. For example, a 1996 act amended 21 U.S.C 853, regarding certain amphetamine and methamphetamine offenses, to require restitution for any injured person "as provided in Section 3663." Pub. L. No. 104-237, § 207, 110 Stat. 3099, 3104; see 21 U.S.C. 853(q). (Section 853(q) was later amended to incorporate Section 3663A instead of Section 3663. See Pub. L. No. 106-310, § 3613(a)(4), 114 Stat. 1101, 1229-1230.) And a 2008 act incorporated Section 3663A in authorizing restitution for certain copy-

right-infringement offenses. 18 U.S.C. 2323(c) (mandating "restitution to any victim of the offense as an offense against property referred to in section 3663A(c)(1)(A)(ii)"); see Pub. L. No. 110-403, § 206(a), 122 Stat. 4256, 4262. By contrast, a 2000 law penalizing human trafficking incorporated not the narrower provisions of Section 3663A but the proximate-loss restitution of 18 U.S.C. 2259. See 18 U.S.C. 1593(b)(3); Pub. L. 106-386, § 112(a)(2), 114 Stat. 1464, 1488.

Then in 2008 Congress further amended the VWPA to extend additional, special relief to victims of identity theft: "the value of the time reasonably spent by the victim in an attempt to remediate the intended or actual harm incurred by the victim from the offense." 18 U.S.C. 3663(b)(6); see also Pub. L. No. 110-326, § 202, 122 Stat. 3560, 3561 (2008) (authorizing this addition). That language covers a host of additional expenses including "the costs of an internal investigation," but, again, applies "only to victims of identity theft," not the crimes covered by the MVRA. *Papagno*, 639 F.3d at 1097.

And Congress has indicated its interest in further modifying restitution statutes. The Justice for All Reauthorization Act of 2016 ordered the GAO to study a possible expansion of Sections 3663 and 3663A. Pub. L. No. 114-324, § 2(d), 130 Stat. 1948, 1948-1949. Specifically, Congress wanted to explore, among other possible amendments, the effects of "requir[ing] that the defendant pay to the victim an amount determined by the court to restore the victim to the position he or she would have been in had the defendant not committed the offense." *Id.* § 2(d)(2)(C), 130 Stat. 1949.

To recap, depending on the type of offense, Congress has authorized restitution for: (1) expenses "related to" "participation" in the investigation or prosecution of the offense or "attendance" at related proceedings, for a

broad set of federal crimes; (2) expenses incurred "during" "participation" in the investigation or prosecution of the offense or "attendance" at related proceedings, for a narrower set of crimes; (3) all "proximate" losses, for an even smaller subset of crimes; and (4) expenses incurred to "remediate" the victim's harm, for identity-theft crimes.

3. Congress has also prescribed steps to calculate the amount of restitution. See 18 U.S.C. 3664. Section 3664 leaves wide discretion for the district court and the probation officer yet little opportunity for the defendant (or, indeed, the victim) to meaningfully participate. To start the process, the U.S. Attorney "provide[s] the probation officer with a listing of the amounts subject to restitution." 18 U.S.C. 3664(d)(1). The probation officer notifies the victims and gives them the opportunity "to submit information," including an affidavit, about "the amount of" their losses. 18 U.S.C. 3664(d)(2)(A)(iii), (vi). For the defendant's part, he informs the officer of his "financial resources." 18 U.S.C. 3664(d)(3).

The officer then prepares a presentence report that gives the court "a complete accounting of the losses to each victim." 18 U.S.C. 3664(a). The judge "may require additional documentation or hear testimony," 18 U.S.C. 3664(d)(4), though "[s]eparate restitution hearings are rare," Hon. William M. Acker, Jr., *The Mandatory Victims Restitution Act Is Unconstitutional. Will the Courts Say So After* Southern Union *v.* United States*?*, 64 Ala. L. Rev. 803, 814 (2013). The court may not consider the defendant's "economic circumstances" in determining the amount of restitution, but may consider them in creating a payment schedule. 18 U.S.C. 3664(f)(1)(A), (f)(2). It is unclear if (or how) a victim may dispute the probation officer's recommendation. Acker, *supra*, at 813-814. Moreover, "[i]f the victim's losses are not ascertainable by the

date that is 10 days prior to sentencing," then the court must "set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." 18 U.S.C. 3664(d)(5). "The sequence of events is so unworkable as to be bizarre." Acker, *supra*, at 814.

4. "[B]etween the enactment of the VWPA and the enactment of the MVRA, federal judges ordered restitution in only 20.2% of the cases." Acker, *supra*, at 811. By making restitution mandatory in certain cases, the MVRA has substantially increased the amount of restitution ordered, but has only negligibly improved victims' actual receipt of money.[1] At the end of the U.S.'s 2016 fiscal year, the government had characterized as "uncollectible" fully 91% of the $110 billion in outstanding restitution. U.S. Gen. Accounting Office, GAO-18-203, *Federal Criminal Restitution: Most Debt Is Outstanding and Oversight of Collections Could Be Improved* 25 (Feb. 2018) [GAO 2018 Report]. Government officials have long acknowledged that "the greatest impediment to collecting full restitution is the lack of relationship between the amount ordered and its corresponding collectability."[2] The vast majority of offenders simply lack the ability to pay no matter how much

---

[1] See, *e.g.*, Letter from Clarence A. Lee, Assoc. Dir., Admin. Office of the U.S. Courts, to Gary T. Engel, Dir. of Fin. Mgmt. and Assurance, U.S. Gen. Accounting Office (June 6, 2001), in U.S. Gen. Accounting Office, GAO-01-664, *Criminal Debt: Oversight And Actions Needed To Address Deficiencies In Collection Processes* 105 [GAO 2001 Report] (explaining that the MVRA "has not resulted in any appreciable increase in compensation to the victims of crime").

[2] Letter from Mary Beth Buchanan, Dir. Executive Office for U.S. Attorneys, U.S. Dep't of Justice, to Gary T. Engel, Dir. Fin. Mgmt. and Assurance, U.S. Gov. Accountability Office (Jan. 13, 2005), in U.S. Gov. Accountability Office, GAO-05-80, *Criminal Debt: Court-ordered Restitution Amounts Far Exceed Likely Collections For The Crime Victims In Selected Financial Fraud Cases* 21 (2005); see, *e.g.*,

they might want to—they are indigent at the time of their offense, their economic situation stagnates during incarceration and does not improve after release, and asset seizures exacerbate the situation. *See* Matthew Dickman, *Should Crime Pay?: A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 Cal. L. Rev. 1687, 1695 (2009); see also, *e.g.*, GAO 2001 Report, *supra*, at 10 (two factors "that have contributed to the significant growth in uncollected criminal debt" are offenders' "minimal earning capacity" and "the assessment of mandatory restitution regardless of the criminal's ability to pay"). Faced with an insurmountable restitution obligation, some offenders give up on even trying to pay. Dickman, *supra*, at 1697. Victims thus rarely receive the amount of restitution they are due.

That failure to pay inflicts multiple costs on all aspects of the criminal-justice system. As to victims, the Judicial Conference has warned that they lose respect for the judicial system when they never receive an expected restitution award. Acker, *supra*, at 835-836. As to the government, a former member of the Administrative Office of the U.S. Courts' Collection Task Force wrote that "the government spends more money trying to collect restitution than the amount it collects." Acker, *supra*, at 833. And collection efforts already suffer from "insufficient staffing resources." OIG Report, *supra*, at 18.

GAO 2018 Report, *supra*, at 25-26; U.S. DOJ, Office of the Inspector Gen., *Review of the Debt Collection Program of the United States Attorneys' Offices* 14 (June 2015) [OIG Report] ("[T]he growth in uncollectable criminal debt is largely attributable to the MVRA requirement that restitution be imposed for the full amount of the victim's losses, without regard to a defendant's ability to pay."). Another significant cause is insufficient government resources devoted to collections. OIG Report, *supra* at ii-iii.

Finally, while mandatory restitution has produced few concrete positive effects for victims, it is imposing real, negative costs on offenders trying to rehabilitate and satisfy their restitution obligations. First, an unpaid restitution order subjects an offender to the threat of future incarceration. See 18 U.S.C. 3613A(a) (providing for revocation of probation and resentencing if the defendant willfully fails to pay). Second, an offender's failure to satisfy all aspects of his sentence, including paying restitution, often deprives him of certain civil rights under state law. For instance, many states disenfranchise offenders who have unpaid restitution obligations. See, *e.g.*, Allyson Fredericksen & Linnea Lassiter, *Disenfranchised by Debt* 13-14 (Alliance for a Just Society, March 2016); *Johnson* v. *Bredesen*, 624 F.3d 742 (6th Cir. 2010) (approving constitutionality of Tennessee restriction); Ala. Code 1975 § 15-22-36.1; Missouri Stat. § 155.133.2; Tex. Elec. Code § 11.002(a)(4).[3] At least one state, Virginia, suspends the offender's driver's license. Va. Stat Ann. § 46.2-395(B); see also Cortney E. Lollar, *What is Criminal Restitution?*, 94 Iowa L. Rev. 93, 98, 123 (2014) ("The collateral consequences triggered by a failure to pay restitution mirror those that attach to other criminal punishments, including continued disenfranchisement for the inability to pay, preclusion from running for office, threat of further incarceration if someone is unable to prove her failure to pay was not willful, and suspension of one's driver's license."). Third, a large restitution order can provoke recidivism—a desperate probationer might "'use illegal means to acquire funds to pay'" his current order. Acker, *supra*, at 837 (quoting *Bearden* v. *Georgia*, 461 U.S. 660, 670-671 (1983)).

---

[3] See https://www.txwp.uscourts.gov/supervision-civil-rights-restoration/index.html.

B. Facts And Procedural History

1. a. Petitioner entered a guilty plea to five counts of wire fraud and one count of conspiracy to commit wire fraud. Pet. App. 1a. Petitioner and his co-conspirators owned companies that had a revolving loan with General Electric Capital Corporation (GECC), the relevant "victim" for MVRA purposes. Petitioner admitted that, for two years, "he and his co-conspirators misled GECC about the value of their accounts receivable to induce GECC to increase the amount of the revolving loan and to provide him and his co-defendants with uncollateralized funds." *Id.* at 4a. When the fraud was finally discovered, GECC invested substantial funds in conducting an internal investigation, employing "forensic experts," "lawyers," and "consultants" to determine the "full extent and magnitude" of the scheme. *Ibid.*[4] The fraud also caused petitioner's companies to file for bankruptcy. *Ibid.* GECC incurred additional legal fees participating in those bankruptcy proceedings, where "[t]he bankruptcy court ordered GECC to continue to make advances to the defendants' companies." *Ibid.* The expenses at issue were incurred outside the context of the government's investigation and prosecution of the offense. *Id.* at 4a-5a.

b. In addition to a 97-month sentence of imprisonment, petitioner was ordered to pay restitution under the MVRA. Pet. App. 16a, 23a-26a. As relevant here, the district court, over petitioner's objection, ordered "restitution for the legal, expert, and consulting fees incurred by [GECC] in investigating the fraud" and for GECC's "legal fees from the bankruptcy proceedings caused by the

---

[4] "An 'internal investigation' is a term generally used when an organization asks an attorney, investigator, or auditor to look into suspected wrongdoing within the organization and determine, for example, what went wrong, whom to hold accountable, and how to prevent recurrence of the problem." *Papagno*, 639 F.3d at 1099 n.2.

fraud." *Id.* at 1a-2a. As the government noted below, there was ultimately no dispute "over the accuracy of the fees contained in the victim impact statements." C.A. Gov't Br. 10. The sole remaining dispute was the "legal basis" for the restitution award. *Id.* at 38a ("There is no dispute that I see raised as to the numbers. The dispute is as to whether or not they should fit into the categories that they have been placed in.").

The district court ultimately concluded restitution was justified under the MVRA. It ordered restitution of $4,107,467.23 for GECC's investigative fees, and $788,897.88 for its legal fees in the bankruptcy case. Pet. App. 35a, 39a; C.A. Gov't Br. 7 (citing C.A. Rec. 337-342, 345-348).[5]

2. a. The Fifth Circuit affirmed. Pet. App. 1a-6a. The court held that, under the MVRA, the restitution order properly included the costs of GECC's internal investigation and bankruptcy-related expenses. *Id.* at 1a-2a. Rather than analyze the MVRA's text, the court explained that "the scope of restitution under subsection 3663A(b)(4) is controlled" by circuit precedent, which "gave a broad reading to § 3663A(b)(4)." Pet. App. 2a-3a (discussing *United States* v. *Phillips*, 477 F.3d 215 (5th Cir. 2007), *United States* v. *Herrera*, 606 F. App'x 748 (5th Cir. 2015) (per curiam), and *United States* v. *Dwyer*, 275 F. App'x 269 (5th Cir. 2008)). Under that broad reading, the court had previously upheld restitution for "investigative audit costs," costs of internal "investigations" (including both "attorneys' fees" and "accounting fees"), and even other expenses "directly caused" by an offense, such

---

[5] The district court also ordered $11,074,047.04 in restitution for the unsecured principal of the loan at the time of petitioner's sentencing, but that aspect of the order is not disputed.

as a university's "costs to notify [potential] victims" of a hacker's "data theft." *Id.* at 2a-3a.

Applying those decisions, the court held that the district court's restitution order was authorized by Section 3663A(b)(4). Pet. App. 4a-5a. It found GECC's private investigation covered because petitioner's scheme "caused GECC to employ forensic experts to secure and preserve electronic data as well as lawyers and consultants to investigate the full extent and magnitude of the fraud and to provide legal advice relating to the fraud." *Id.* at 4a. And it found GECC's bankruptcy-related fees covered because they "were directly caused by [petitioner's] fraud for purposes of restitution." *Ibid.* (citing 18 U.S.C. 3663A(a)(2), (b)(4)). The court nowhere suggested that either set of expenses were justified as requested or required by government investigators or prosecutors.

The court expressly recognized that "the D.C. Circuit takes a narrower view of restitution under subsection 3663A(b)(4)." Pet. App. 4a-5a (citing *United States* v. *Papagno*, 639 F.3d 1093 (D.C. Cir. 2011)). But it declared itself bound by circuit authority: "Whatever the merits of the contrary reasoning in *Papagno*, this panel is bound by this Court's prior decision in *Phillips* and will follow it here." *Id.* at 5a; see also *id.* at 5a n.2 (asserting that the D.C. Circuit's "restrictive reading" is "unique among the circuits, several of which have come to the opposite conclusion, although without the benefit of *Papagno*'s reasoning") (citing pre-*Papagno* cases from the Second, Sixth, Seventh, Eighth, and Ninth Circuits—but doing so without discussing post-*Papagno* cases from three of those circuits).

b. Judge Higginson concurred. Pet. App. 6a-11a. He joined the court's opinion but wrote separately "to suggest that we may be interpreting Section 3663A(b)(4) too broadly." *Id.* at 6a. Looking to the "'plain language and

structure of the statute,'" he "agree[d] with the D.C. Circuit's persuasive interpretation of the statutory terms." *Id.* at 6a-7a (citing *Papagno*, 639 F.3d at 1098-1101). Under that interpretation, "'participating' in a government investigation does not embrace an internal investigation, 'at least one that has not been required or requested by criminal investigators or prosecutors.'" *Ibid.* (citing *Papagno*, 639 F.3d at 1098-1099).

Judge Higginson also demonstrated that "three additional points support the D.C. Circuit's narrow reading of the statute." Pet. App. 7a. First, employing the "*noscitur a sociis* canon," he found that the relevant expenses here, like all other covered expenses, "must take place within the context of the government's criminal enforcement." *Ibid.* Second, he explained that "a broad reading of Section 3663A(b)(4) is difficult to administer," citing confusion among the circuits adopting the majority position. *Id.* at 7a-10a; see also *id.* at 8a (explaining that the majority approach "requires district courts to undertake difficult analyses," and declaring that "I do not envy district courts faced with this task"). Finally, he noted that "limiting the reach of Section 3663A(b)(4) does not prevent victims from fully recovering their losses": "there are a number of other more explicit and specific criminal restitution provisions that may allow for recovery," and "where criminal restitution statutes fall short, victims may bring their own civil actions to recover their losses." *Id.* at 10a-11a.

SUMMARY OF ARGUMENT

According to the court of appeals, the MVRA authorizes restitution for unprompted internal investigations and litigation expenses in a bankruptcy case. The court is wrong. Under a proper construction, Section 3663A(b)(4) is limited to the four categories of costs that Congress carefully enumerated in the statute. The relevant section

here—Section 3663A(b)(4)—imposes multiple conditions that the restitution order cannot meet. The court of appeals misconstrued the statute, and its judgment should be reversed.

First, Section 3663(b)(4)'s plain text does not cover the professional costs at issue. The MVRA authorizes restitution for "lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." 18 U.S.C. 3663A(b)(4). That section is textually limited to a *singular* investigation related to a *criminal* offense. It thus applies to government investigations, not private investigations, and is limited to private costs *during participation* in the government's enforcement activities. That means private conduct that merely *assists* the government is not enough, and private expenses incurred *before* the government's "investigation and prosecution" are textually foreclosed. Where, as here, a private party acts on its own, unprompted by the government, it incurs costs that are not "necessary" to the government's efforts, from activity that did not "participate" in the relevant investigation, and based on costs incurred before (not *during*) the relevant period.

Each failing is sufficient to remove the restitution claim from the MVRA. But a more fundamental problem also exists: the only enumerated categories of expenses—"child care" and "transportation"—bear no resemblance at all to a company's extended internal investigation. The enumerated categories—the ones Congress chose to articulate—represent incidental, out-of-pocket costs for meeting with federal agents or testifying at trial; the internal-investigation expenses, by contrast, are *direct* costs for striking out on one's own. They are worlds apart

in scope and magnitude, and they serve different functions and interests. Under settled application of ejusdem generis, those costs fall well outside the "other expenses" contemplated by the statute.

Second, Section 3663A(b)(4)'s context and history support the plain-text interpretation of the provision. The MVRA's language tracks the language of other restitution provisions, but differs in material ways. Those ways *constrict* its scope: at the same time Congress crafted Section 3663A(b)(4)'s core language, it also provided expansive restitution provisions for other crimes—using language that easily encompasses the types of expenses the government seeks to cover here. Because Congress's use of disparate language is presumptively deliberate, the government errs in failing to acknowledge Congress's preference for more constrained terminology in Section 3663A(b)(4).

Third, the contrary interpretation advanced by the government and multiple lower courts is mistaken. These courts ignore the MVRA's plain language and structure; they attempt to gloss over textual limitations based on purported statements of legislative purpose (derived from ambiguous statements in the legislative history); and they confuse statutory restrictions on who is *eligible* for restitution for the standards setting out *eligible recovery* for those entitled to collect.

In any event, while Section 3663A's plain text, context, and history make this a straightforward case, the rule of lenity would tip the scales in petitioner's favor were there any ambiguity left to construe.

The court of appeals applied an incorrect interpretation of the MVRA, and the restitution order cannot stand under a proper construction. The judgment below should be reversed.

ARGUMENT

I. THE MVRA DOES NOT AUTHORIZE RESTITUTION FOR INTERNAL INVESTIGATIONS AND PROFESSIONAL FEES THAT WERE INDEPENDENT OF THE CRIMINAL INVESTIGATION AND UNPROMPTED BY THE GOVERNMENT

Under the MVRA, Congress authorized restitution for "lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." 18 U.S.C. 3663A(b)(4).

In the decision below, the court of appeals read this language to cover the costs of private internal investigations, even if those investigations were unprompted by the government, conducted for a corporation's own purposes, and conducted independent of the criminal investigation—indeed, conducted *before* the criminal investigation even began. And the court likewise interpreted the MVRA to authorize professional fees in a bankruptcy case that also had nothing to do with the government's criminal enforcement—simply because the crime supposedly "caused" the bankruptcy.

The court of appeals was wrong. Section 3663A(b)(4)'s plain text, context, and history establish that unprompted internal investigations and professional fees are excluded from the MVRA. The contrary decision below cannot be squared with the language or logic of the controlling statute, or Congress's broader statutory scheme for restitution.

A. Section 3663A(b)(4) Does Not Cover Private Costs That Were Unprompted By The Government, Preceded The Criminal Investigation, And Were Incurred For The Victim's Own Purposes

1. Section 3663A(b)(4)'s plain text unambiguously excludes independent internal investigations and separate civil litigation from the MVRA

The proper disposition of this case begins and ends with the statutory text. See, *e.g.*, *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1721 (2017); *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999). Section 3663A(b)(4)'s plain language confirms that unprompted internal investigations and private professional costs are not covered. That unambiguous text imposes multiple conditions to qualify for restitution, and unprompted internal investigations and professional fees satisfy none of those conditions.

a. 1. First, it is insufficient to show that expenses were incurred while participating in *any* investigation; "*the* investigation" (in the singular) is the *government's* investigation. 18 U.S.C. 3663A(b)(4) (emphasis added).

This conclusion follows directly from the statutory text: "the singular 'offense' referred to in § 3663A(b)(4) is of course the criminal offense of conviction," and thus "[t]he singular 'investigation or prosecution' of 'the offense' is * * * the [*government's*] criminal investigation and prosecution." *Papagno*, 639 F.3d at 1097-1098; see also, *e.g.*, *United States* v. *Juvenile Female*, 296 F. App'x 547, 551 (9th Cir. 2008) (Berzon, J., dissenting) ("it seems plain to me that '*the* investigation' for which restitution is available under § 3663A(b)(4) is the government's official investigation, not an entirely separate one engaged in by the victim's relatives").

Moreover, the section textually couples "*the* investigation or *prosecution*"—the key article ("the") applies to both terms. This pairing confirms that the investigation is the government's investigation. Only the government can prosecute "the offense" (a criminal term), and the pairing shows that Congress viewed the two actions together. The only investigation naturally paired with a criminal prosecution is a *criminal* investigation—especially when designated as "*the* investigation or prosecution *of the offense*."

Finally, if Congress meant to sweep in any investigation, even private ones, it would have simply said that. It could have framed the statute as applying to "any investigation" (or even "an investigation"). It instead singled out a specific investigation in the singular, linked it with the government's prosecution, and did so against the backdrop of a statute focused on punishment for "a defendant convicted of an offense." 18 U.S.C. 3663A(a)(1).

It thus is not enough to identify expenses incurred during participation in an internal investigation; "it is participation in *the* investigation—the government's investigation—that is subject to restitution, not costs incurred when striking out on one's own." *Juvenile Female*, 296 F. App'x at 551 (Berzon, J., dissenting).

2. The same analysis applies to "attendance at proceedings related to the offense." Congress plainly intended to cover related criminal, not civil, "proceedings." For one, just as the investigation and prosecution refer to the government's *criminal* enforcement, it makes sense to likewise read the final clause "by the company it keeps." *Yates* v. *United States*, 135 S. Ct. 1074, 1085 (2015) (describing the noscitur a sociis canon). The section focuses on compensating victims for the incidental costs of the government's investigation and prosecution of the criminal offense; reimbursement for attendance at the

government's proceedings (those related to *the offense*) is the only natural reading.

For another, any contrary reading would produce bizarre results. Even if this final clause somehow captured civil suits, it would only cover the incidental costs of "attend[ing]" those proceedings, *not the actual costs or expenses of litigation*. While it makes sense to cover the victim's costs of attendance at *criminal* proceedings—the victim, for example, may have to testify—the costs of attending a civil suit (with the victim presumably as plaintiff) bear no obvious relation to Section 3663A's aims. There is no rational theory why Congress would have singled out a narrow sliver of expenses associated with litigating freestanding tort suits (or bankruptcy cases), but left all the other associated expenses uncompensated.[6]

b. Second, the covered costs must be incurred during "participation" in the investigation or prosecution (18 U.S.C. 3663A(b)(4)), which necessarily means taking part in the government's work. An unsolicited internal investigation, conducted entirely outside the government's investigation, may eventually *assist* the government's efforts, but it does not qualify as "*participation*" in those efforts.

---

[6] Moreover, even had Congress intended to cover *some* "expenses" in civil proceedings, it did not cover attorney's fees. There is a strong presumption under the American Rule that "parties are to bear their own attorney's fees." *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 533 (1994). To reverse that presumption, Congress must legislate with "explicit statutory authority." *Baker Botts L.L.P.* v. *ASARCO LLC*, 135 S. Ct. 2158, 2164 (2015) (internal quotation marks omitted). Because Section 3663A(b)(4) has no "'specific and explicit provisions for the allowance of attorneys' fees'" (*ibid.*), it necessarily leaves the default presumption in place. And the omission in Section 3663A(b)(4) is notable: Congress expressly authorized "attorneys' fees" in other restitution provisions (*e.g.*, 18 U.S.C. 2259(b)(3)(E)), but conspicuously omitted such a provision in Section 3663A(b)(4).

"The dictionary definition of 'participation' is the 'act of taking part or sharing in something.'" *Papagno*, 639 F.3d at 1098 (quoting sources). In common parlance, that does not mean simply "assisting" another's work. An inventor who improves a polygraph machine may *assist* future FBI investigations, but no one colloquially says the inventor *participated* in those investigations. See *ibid.* (offering similar examples). And this Court has reached the same conclusion in other contexts, "reject[ing] the proposition that 'aid' equals 'participation.'" *Ibid.*; see also, *e.g.*, *Pa. Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 211 (1998).

Participation, in short, means working with the government as it performs *its* work, not conducting a separate investigation on one's own—which is precisely what a corporation does by acting independently from the government. "The possibility that the [corporation's] internal investigation might later assist the criminal investigation or prosecution—for example, in plea negotiations—does not mean those who conducted the internal investigation were somehow taking part in the separate, criminal investigation or prosecution conducted by the criminal investigators and prosecutors." *Papagno*, 639 F.3d at 1099.

This common-sense distinction is reinforced by the enumerated terms in Section 3663A(b)(4). Each term ("lost income," "child care," "transportation") is designed to enable the party to *participate* in the government's work: it does not focus on private expenses one might incur in *running* a private investigation (things like professional fees for lawyers or auditors); it instead focuses exclusively on *incidental* costs designed to compensate a person for making themselves available *to the government*. Each expense—like "child care" and "transportation"—is necessary so the person can do things like meet with federal agents and testify at criminal proceedings.

Child care and transportation are not themselves needed to conduct an investigation; they are needed to *facilitate* interaction with the *government's* investigation. The contemplated role is providing evidence and testimony so the government can complete *its job*, not so it can outsource its investigatory duties to private actors.

A private, parallel investigation may thus *assist* the government, but it is not *participating* in "the investigation." And that is especially so where the investigation was "neither required nor requested" by the government (*Papagno*, 639 F.3d at 1099): at least where the government has put in the request, the private actor is *coordinating* with the official investigation. But an investigation conducted entirely separately (indeed, without the knowledge of the government) is not commonly described as "participating" in that other investigation.[7]

c. Section 3663A(b)(4) explicitly requires that covered expenses be incurred "*during*" participation in the investigation or prosecution. That language means exactly what it says. "During" does not mean *before*. A private investigation that *precedes* the government's investigation does not generate expenses *during* the government's investigation; "[a]fter all, one cannot ordinarily be participating in something that has not yet begun." *Papagno*, 639 F.3d at 1099.[8]

---

[7] This line also respects the government's critical role in criminal enforcement. The government is not expected to outsource its sovereign functions to private actors. The MVRA does not contemplate restitution for *the government's* expense in investigating an offense; surely it makes little sense to shift those costs to the defendant whenever the government can convince a private citizen to take on the government's core responsibilities.

[8] To be clear, even if the government's investigation is underway, a covered expense must still be incurred "during *participation*" in the

Nor was this language accidental, as underscored by a "critical" difference between the MVRA's Section 3663A(b)(4) and the VWPA's Section 3663(b)(4). *Juvenile Female*, 296 F. App'x at 551 (Berzon, J., dissenting). While Section 3663A(b)(4) is limited to expenses "*during* participation in the investigation," Section 3663(b)(4) covers "expenses *related to* participation in the investigation." *Ibid.* (emphases in original). As Judge Berzon explained, "[t]he difference is both obvious and significant": "Whether or not [the victim's] investigative activities were 'related to' participation in the government's investigation, they did not occur 'during participation' in it." *Ibid.*[9]

"[W]hen Congress includes particular language in one section of a statute but omits it in another," "this Court presumes that Congress intended a difference in meaning." *Loughrin* v. *United States*, 134 S. Ct. 2384, 2390 (2014) (internal quotation marks and alternation omitted). The difference in meaning here is clear: if an expense is incurred before the government's investigation begins, it is not incurred "during" that (non-existent) investigation. Such expenses are not covered under the MVRA.[10]

---

investigation. This is one reason (among others) that a parallel investigation is not automatically covered: even if the expenses were incurred at the same time as the government's work, they are excluded unless they were incurred while *participating* in the government's work. Each statutory condition must be met.

[9] Even the Second Circuit, a court aligned with the court of appeals below, admitted the difficulty of saying expenses incurred *before* the government's investigation were somehow incurred "during" that investigation. See *United States* v. *Cuti*, 778 F.3d 83, 96 n.5 (2d Cir. 2014).

[10] There are sound reasons Congress might have written the statute the way that it did. For example, it avoids difficult questions re-

d. Section 3663A(b)(4) authorizes restitution only for "necessary" expenses, and an expense cannot be "necessary" for participation in the investigation if nobody requested it. "It is difficult—indeed, impossible—to argue that an internal investigation neither required nor requested by criminal investigators was an expense *necessary*" for "participation in the investigation or prosecution." *Papagno*, 639 F.3d at 1100.

An expense is not "necessary" if the government is already obligated to do the work and no one asked the victim to do it. That describes most internal investigations: the government is particularly well-suited to conduct its own investigation, and the private actor need not incur the expenses to replicate the government's work on its own. Indeed, "[i]t is not particularly common for criminal investigators to ask an organization to conduct an internal investigation. Criminal investigators tend to think such activity can compromise the criminal investigation or subsequent prosecution—for example, by multiplying witness statements." *Papagno*, 639 F.3d at 1100 n.5.

Moreover, treating unsolicited internal investigations as "necessary" imposes "challenging restitution calculations" on district judges. Pet. App. 9a-10a (Higginson, J., concurring); *id.* at 8a ("I do not envy district courts faced with this task."). An internal investigation typically asks "what went wrong, whom to hold accountable, and how to prevent recurrence of the problem." *Papagno*, 639 F.3d at 1099 n.2. The scope of the investigation thus will often exceed the simple identification of wrongdoing for criminal

---

garding whether private work was really necessary to the investigation, or simply used (to whatever effect) because it already exists. It also avoids restitution for tasks the government would have performed on its own. These checks avoid administrability concerns and ensure fairness to all sides. See, *e.g.*, Pet. App. 7a-11a (Higginson, J., concurring).

prosecution, and it will be difficult to disaggregate necessary expenses from unnecessary ones (including, of course, the costs incurred to investigate the crime versus the costs incurred to prevent its recurrence or seek civil redress).

And those challenges become even more pronounced where the internal investigation was neither required nor requested by the government. In those situations, there is a greater likelihood of redundant and overlapping work (due to the lack of coordination), and it is also more difficult to determine what evidence the government really wanted or needed (if the government receives a report sweeping past its core focus). See, *e.g.*, Pet. App. 7a-10a (Higginson, J., concurring) (outlining thorny hypotheticals caused by the Fifth Circuit's view).

Part of the MVRA's logic is avoiding complex factual disputes. See 18 U.S.C. 3663A(c)(3)(B) (excusing restitution where "determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process").[11] Enforcing the statutory standard helps avoid these difficult questions, and ensures expenses truly are "necessary" before saddling a defendant with significant liability in a criminal judgment. And it is hard to say expenses are "necessary" where a company, unprompted, decides to undertake the government's investigative role on its own.

e. In any event, there is a more fundamental reason that Section 3663A(b)(4) bars reimbursement for internal

---

[11] Cf. S. Rep. 104-179, 104th Cong., 1st Sess. 18 (1995) (looking to "guarantee[] that the sentencing phase of criminal trials do not become fora for the determination of facts and issues better suited to civil proceedings").

investigations and professional fees: Under a straightforward application of ejusdem generis, professional fees from internal investigations and civil litigation do not qualify as "other expenses."

The statute sets out a specific list of covered costs: "*lost income* and necessary *child care*, *transportation*, and *other expenses* incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." 18 U.S.C. 3663A(b)(4) (emphases added). "'[W]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects *similar in nature* to those objects enumerated by the preceding specific words.'" *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 114-115 (2001); see also, *e.g.*, *CSX Trans., Inc.* v. *Ala. Dep't of Revenue*, 562 U.S. 277, 294-295 (2011).

Thus, when Congress wrote "other expenses" in the MVRA, it necessarily wrote other *like* expenses; the residual clause encompasses only "subjects comparable to the specifics it follows." *Hall Street Assocs., L.L.C.* v. *Mattel, Inc.*, 552 U.S. 576, 586 (2008). An extensive, self-initiated internal investigation, employing attorneys, auditors, and forensic accountants, is in no way "comparable" to minor incidental expenses associated with missing work or traveling to meet with federal agents or testify at trial. For example, no one thinks each of the following statements go together: "Pay for my babysitter, pay for my parking, and pay for my half-year, multimillion-dollar internal investigation." One category is nothing like the others, and this language is not how Congress would have included something as different and significant as those professional expenses.

Moreover, the enumerated categories share an obvious connection that professional fees do not: "transportation" and "child care" costs are incidental, out-of-pocket

expenses, representing the day-to-day costs associated with making oneself available to the government for *its* investigatory and prosecutorial work. None are expenses from *direct* participation in an investigation.

Investigation expenses and professional fees often comprise significant sums that affect defendants and victims in material ways. Here, for example, the restitution order included nearly $5 million of private fees and expenses, and other cases involve similarly substantial amounts. See, *e.g.*, *Papagno*, 639 F.3d at 1095 ($160,000 in expenses); *United States* v. *Bahel*, 662 F.3d 610, 648 (2d Cir. 2011) (nearly $850,000 in legal fees); *United States* v. *Hosking*, 567 F.3d 329, 331 (7th Cir. 2009) ($125,000 in investigation expenses); *United States* v. *Skowron*, 529 F. App'x 71, 73 (2d Cir. 2013) ($3.827 million in expenses). These totals are hardly in the same universe as taxi fare, parking fees, or child-care costs.

Congress knows how to write a statute to include those costs when it so wishes—and Congress is well aware of the background principles of ejusdem generis. The catchall phrase here—"other expenses"—is not nearly so capacious as to cover professional fees incurred for the victim's own purposes and unprompted by any official government action.

2. Section 3663A(b)(4)'s statutory context and history confirm that restitution is unauthorized for these expenses

Section 3663A(b)(4)'s statutory context and history further establish that the MVRA does not authorize restitution for these expenses.

a. First, at the same time that Congress added Section 3663(b)(4) to the VWPA—which was the foundation for Section 3663A(b)(4) of the MVRA—Congress added a series of *other* provisions that broadly capture expenses that are not covered here. Indeed, in a series of enactments,

Congress set out rights for particular crime victims that expressly included (i) awards of attorney's fees, and (ii) sweeping restitution for any costs "proximately caused" by the subject offense. See, *e.g.*, 18 U.S.C. 2259(b)(3)(E), (F) (authorizing "attorneys' fees" and "any other losses suffered by the victim as a proximate result of the offense"; added as § 40113(b)(1) of the 1994 Act); 18 U.S.C. 2248(b)(3)(E), (F) (same; added as § 40113(a)(1) of the 1994 Act). Moreover, these provisions expressly apply "[n]othwithstanding section 3663 or 3663A" (18 U.S.C. 2259(a)), showing that Congress was indeed aware of the stark differences between these restitution provisions.

Second, Congress amended the VWPA again in 2008 to authorize restitution for "internal investigations" by "identity theft" victims, "even if the internal investigation was neither required nor requested by the criminal investigators or prosecutors." *Papagno*, 639 F.3d at 1099 (describing 18 U.S.C. 3663(b)(6)). Congress thus added Section 3663(b)(6) precisely because Section 3663's *preexisting* sections—including Section 3663(b)(4)—did not provide that broad relief. *Id.* at 1099-1100. But Congress chose to limit that new coverage to identify-theft victims, and Congress opted not to "add similar language" to broaden Section 3663A(b)(4). *Id.* at 1099.

As this Court has "often" stated, "when 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Papagno*, 639 F.3d at 1099-1100 & n.3 (quoting *Kucana* v. *Holder*, 558 U.S. 233, 248-249 (2010)). Section 3663A enumerates four specific categories of recovery as the only expenses eligible for restitution, none of which embrace the kinds of costs authorized in those other Acts. If Congress truly in-

tended to extensively cover all professional costs and internal-investigation expenses, it knew precisely how to do it.

b. Section 3663A's historical backdrop also supports faithfully applying the statute's narrow scope. Until 1982, restitution was not permitted outside the probation context. *Papagno*, 639 F.3d at 1096. Courts lacked the power to impose restitution absent specific statutory authorization. See *ibid.* These new restitution provisions thus changed the default rules that had otherwise applied for extensive periods of time.

A sweeping construction of the MVRA would represent a sharp departure from baseline norms. It may indeed be permissible to abandon traditional limits on restitution (reaching not just disgorgement but consequential damages),[12] but courts are reluctant to presume a derogation of the common law absent specific language to that effect. See, *e.g.*, *United States* v. *Texas*, 507 U.S. 529, 534 (1993). There is no such specific language here—even though there *is* such specific language in other restitution provisions.

The internal-investigation costs at issue are traditionally the subject of civil tort suits, where courts can provide make-whole recovery without intruding upon the criminal-justice system's need for swift and efficient sentencing. Section 3663A lacks the kind of clear language typi-

---

[12] See, *e.g.*, Bradford Mank, *The Scope of Criminal Restitution: Awarding Unliquidated Damages in Sentencing Hearings*, 17 Capital Univ. L. Rev. 55, 69 (1987) (citing, *inter alia*, 4 W. Blackstone, *Commentaries on the Laws of England* 356 (1769)); see also Richard E. Laster, *Criminal Restitution: A Survey of Its Past History and An Analysis of Its Present Usefulness*, 5 U. Rich. L. Rev. 71, 75-81 (1970) (explaining the origins of highly restricted common law restitution).

cally required to abandon this traditional division of authority. *Texas*, 507 U.S. at 534-536; see also *United States* v. *Nucci*, 364 F.3d 419, 423-424 (2d Cir. 2004) (applying this principle to the MVRA itself); *United States* v. *Tilleras*, 709 F.2d 1088, 1092 (6th Cir. 1983) ("Even when such an intention [to abrogate common law by statute] is explicit, the scope of the common law will be altered no further than is necessary to give effect to the language of the statute.").

B. The Contrary Interpretation—Embraced By The Government And Multiple Courts Of Appeals—Is Unsupportable

Notwithstanding Section 3663A's plain text, context, and history, the government and several courts of appeals resist assigning the statute its natural scope. For multiple reasons, their interpretation is incorrect and should be rejected.

1. The government argues that *Papagno*'s "restrictive understanding of Section 3663A(b)(4) loses sight" of the MVRA's "'purpose,'" which is "'to ensure that victims of a crime receive full restitution.'" Br. in Opp. 11 (quoting *Dolan* v. *United States*, 560 U.S. 605, 612 (2010)). But "no legislation pursues its purposes at all costs," and "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam).

Congress's purpose is ultimately reflected in its actual text. And if Congress truly meant to "ensure" that crime victims receive "full restitution," it would have written a simple, general statute that says exactly that—as opposed to a carefully delineated statute that limits restitution to specific, enumerated categories. Compare, *e.g.*, 18 U.S.C. 2259(b)(3)(F).

Moreover, the government overlooks that victims can still recover in full even if restitution is properly cabined to its statutory limits: "where criminal restitution statutes fall short, victims may bring their own civil actions to recover." Pet. App. 10a-11a (Higginson, J., concurring).

2. Because the statute reimburses for participating in an investigation, certain courts have presumed that *any* investigation qualifies. See, *e.g.*, *United States* v. *Amato*, 540 F.3d 153, 162 (2d Cir. 2008) (authorizing restitution for *both* a corporation's "own internal investigation" *and* "its participation in the government's investigation and prosecution"). As explained above, however, that assumption is refuted by the statute's plain text. See *Papagno*, 639 F.3d at 1097-1098 ("[t]he singular 'investigation or prosecution' of 'the offense' is therefore the criminal investigation and prosecution" conducted by the government); *Juvenile Female*, 296 F. App'x at 551 (Berzon, J., dissenting) ("it is participation in *the* investigation—the government's investigation—that is subject to restitution, not costs incurred when striking out on one's own"). The courts have failed to grapple with this obvious counterargument.

For its part, the government, invoking the Dictionary Act, argues that "the investigation" referenced in Section 3663A(b)(4) is not necessarily limited to a *single* investigation, because "words importing the singular include and apply to several persons, parties, or things." Br. in Opp. 10 (quoting 1 U.S.C. 1). But Congress confirmed that the Act's default drafting rules do not apply where "the context indicates otherwise" (1 U.S.C. 1), as it assuredly does here. The government has not explained how its reading of the statute makes any sense in its natural context.

3. According to the Fifth Circuit, the MVRA authorizes any expenses directly or proximately caused by the crime—irrespective of any attempt to fit the expense in

one of Section 3663(b)'s enumerated categories. Pet. App. 2a-5a (authorizing fees "directly caused" by defendant's "wire fraud scheme"); *United States* v. *Stennis-Williams*, 557 F.3d 927, 930 (8th Cir. 2009) (asking only whether expenses "were directly caused by a defendant's fraudulent conduct"); C.A. Gov't Br. 10 ("This Court's precedent as well as a majority of Circuit precedent interpret 18 U.S.C. § 3663A as expressly authorizing such expenses for restitution, where, as here, the expenses are shown to be directly caused by the defendant's fraud.").

This ignores the MVRA's clear structure. These cases are borrowing the standard from Section 3663A(a)(2), which defines *which "victims" are eligible* for restitution; once a qualified candidate is identified, courts must still look to Section 3663A(b), which defines the scope of *eligible expenses*. Congress did not carefully delineate the scope of restitution to simply revert back to any expenses somehow "caused" by the offense. See, *e.g.*, *Papagno*, 639 F.3d at 1100 ("this particular restitution provision—unlike some others—does not afford a right to reimbursement for all costs caused in some sense by the defendant").

C. Under The Rule of Lenity, Any Statutory Ambiguity Should Be Construed Against Sweeping And Unconventional Restitution Orders

As explained above, it is clear that Section 3663A forecloses restitution for these expenses. But to the extent any ambiguity exists, it must be construed against increased punishment. *Hughey* v. *United States*, 495 U.S. 411, 422 (1990); see also, *e.g.*, *Jones* v. *United States*, 529 U.S. 848, 858 (2000); *United States* v. *Santos*, 553 U.S. 507, 514 (2008) (plurality op.) (Scalia, J.) ("Under a long line of our decisions, the tie must go to the defendant."). The Court has applied the rule of lenity in the context of criminal restitution. *Hughey*, 495 U.S. at 412-413. It ensures

that Congress, not the judiciary, sets the outer punishment for an offense.

If Congress wanted to expand restitution to cover unprompted, private, voluntary costs of conducting extensive internal investigations and civil litigation, it would have said so expressly. What it did say points in the opposite direction, and any contrary indications are insufficient to tip the scales toward increased punishment.

II. THE COURT OF APPEALS ERRED IN APPLYING THE MVRA TO THE UNDISPUTED FACTS OF THIS CASE

The court of appeals' erroneous construction of Section 3663A(b)(4) was outcome-determinative below. Under a proper construction, the government's claim for restitution fails on every level.

First, the government's claim to recover the costs of the internal investigation is meritless: (i) the expenses were not incurred as part of the government's investigation; (ii) GECC failed to participate in that investigation (merely assisting is not enough); (iii) GECC did not incur any expenses *during* the government's investigation (because GECC's investigation *preceded* it); (iv) its expenses were not required or requested by the government, and hence were not "necessary" to the government's enforcement; and (v) its professional fees are not properly covered at all. Each failing independently infects the judgment below.

Second, the government's claim to recover the costs of the bankruptcy litigation is also meritless: (i) none of those fees were required or requested by the government; (ii) none had anything to do with the government's investigation or prosecution (or, indeed, *any* investigation); (iii) none were directly caused by the offense (they were directly caused by the *bankruptcy*); (iv) none resemble "child care" or "transportation" (or otherwise qualify as

"other expenses"); and (v) none are expressly included in Section 3663A(b)(4), even if the Fifth Circuit felt GECC qualified as a "victim" under Section 3663A(b)(2).

Because these expenses fall outside the permissible scope of Section 3663A(b)(4), the judgment ordering the corresponding restitution was incorrect, and it should be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

RANDOLPH L. SCHAFFER, JR.
1021 Main, Suite 1440
Houston, TX 77002

DANIEL L. GEYSER
Counsel of Record
STRIS & MAHER LLP
Three Energy Square
6688 N. Central Expy., Ste. 1650
Dallas, TX 75206
(214) 396-6634
daniel.geyser@strismaher.com

PETER K. STRIS
DOUGLAS D. GEYSER
JOHN STOKES
STRIS & MAHER LLP
725 S. Figueroa St., Ste. 1830
Los Angeles, CA 90017

FEBRUARY 2018

APPENDIX

1. 18 U.S.C. 3663A provides:

§ 3663A. Mandatory restitution to victims of certain crimes

(a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant--

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense--

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to--

(i) the greater of--

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim--

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psycho-

logical care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense–

(A) that is–

(i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances

Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit;

(iii) an offense described in section 1365 (relating to tampering with consumer products); or

(iv) an offense under section 670 (relating to theft of medical products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that--

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.

2. 18 U.S.C. 3663 provides:

§ 3663. Order of restitution

(a)(1)(A) The court, when sentencing a defendant convicted of an offense under this title, section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861, 863) (but in no case shall a participant in an offense under such sections be considered a victim of such offense under this section), or section 5124, 46312, 46502, or 46504 of title 49, other than an offense described in section 3663A(c), may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense, or if the victim is deceased, to the victim's estate. The court may also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(B)(i) The court, in determining whether to order restitution under this section, shall consider--

(I) the amount of the loss sustained by each victim as a result of the offense; and

(II) the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

(ii) To the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the

need to provide restitution to any victims, the court may decline to make such an order.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.

(b) The order may require that such defendant–

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense--

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of--

(i) the value of the property on the date of the damage, loss, or destruction, or

(ii) the value of the property on the date of sentencing,

less the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim including an offense under chapter 109A or chapter 110–

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury also results in the death of a victim, pay an amount equal to the cost of necessary funeral and related services;

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense;

(5) in any case, if the victim (or if the victim is deceased, the victim's estate) consents, make restitution in services in lieu of money, or make restitution to a person or organization designated by the victim or the estate; and

(6) in the case of an offense under sections 1028(a)(7) or 1028A(a) of this title, pay an amount equal to the value of the time reasonably spent by the victim in an attempt to remediate the intended or actual harm incurred by the victim from the offense.

(c)(1) Notwithstanding any other provision of law (but subject to the provisions of subsections (a)(1)(B)(i)(II) and (ii), when sentencing a defendant convicted of an offense described in section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861, 863), in which there is no identifiable victim, the court may order that the defendant make restitution in accordance with this subsection.

(2)(A) An order of restitution under this subsection shall be based on the amount of public harm caused by

the offense, as determined by the court in accordance with guidelines promulgated by the United States Sentencing Commission.

(B) In no case shall the amount of restitution ordered under this subsection exceed the amount of the fine which may be ordered for the offense charged in the case.

(3) Restitution under this subsection shall be distributed as follows:

(A) 65 percent of the total amount of restitution shall be paid to the State entity designated to administer crime victim assistance in the State in which the crime occurred.

(B) 35 percent of the total amount of restitution shall be paid to the State entity designated to receive Federal substance abuse block grant funds.

(4) The court shall not make an award under this subsection if it appears likely that such award would interfere with a forfeiture under chapter 46 or chapter 96 of this title or under the Controlled Substances Act (21 U.S.C. 801 et seq.).

(5) Notwithstanding section 3612(c) or any other provision of law, a penalty assessment under section 3013 or a fine under subchapter C of chapter 227 shall take precedence over an order of restitution under this subsection.

(6) Requests for community restitution under this subsection may be considered in all plea agreements negotiated by the United States.

(7)(A) The United States Sentencing Commission shall promulgate guidelines to assist courts in determining the amount of restitution that may be ordered under this subsection.

(B) No restitution shall be ordered under this subsection until such time as the Sentencing Commission promulgates guidelines pursuant to this paragraph.

(d) An order of restitution made pursuant to this section shall be issued and enforced in accordance with section 3664.

3. 18 U.S.C. 2259 provides:

§ 2259. Mandatory restitution

(a) **In general.**—Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under this chapter.

(b) **Scope and nature of order.**—

(1) **Directions.**—The order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim's losses as determined by the court pursuant to paragraph (2).

(2) **Enforcement.**—An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.

(3) **Definition.**—For purposes of this subsection, the term "full amount of the victim's losses" includes any costs incurred by the victim for—

(A) medical services relating to physical, psychiatric, or psychological care;

(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temporary housing, and child care expenses;

(D) lost income;

(E) attorneys' fees, as well as other costs incurred; and

(F) any other losses suffered by the victim as a proximate result of the offense.

(4) **Order mandatory.**—(A) The issuance of a restitution order under this section is mandatory.

(B) A court may not decline to issue an order under this section because of--

(i) the economic circumstances of the defendant; or

(ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.

(c) **Definition.**—For purposes of this section, the term "victim" means the individual harmed as a result of a commission of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named as such representative or guardian.